



United States Attorney
Southern District of New York

The Jacob K. Javits Federal Building
26 Federal Plaza, 37th Floor
New York, New York 10278

December 11, 2024

BY ECF

The Honorable Jennifer H. Rearden
United States District Judge
500 Pearl Street
Southern District of New York
New York, New York 10007

Re: *United States v. Sergey Shestakov, 23 Cr. 16 (JHR)*

Dear Judge Rearden:

The Government respectfully submits this letter outlining the relevant legal framework under the Classified Information Procedures Act (“CIPA”), 18 U.S.C. app. 3. As the Court is aware, on February 8, 2023, the Government filed a letter providing a general overview of CIPA. (Dkt. 20). This letter supplements that letter and, in particular, provides a summary of CIPA’s statutory framework as it pertains to filings pursuant to Section 4 of CIPA, including the Government’s September 30, 2024 Section 4 CIPA filing.

CIPA Section 4: Discovery and Protective Orders

Section 4 of CIPA outlines the procedures to be followed when the Government seeks to limit the information it is providing to the defense in the context of the discovery process. Among its provisions, CIPA authorizes a court to deny or modify discovery of classified information that ordinarily would be produced pursuant to Federal Rule of Criminal Procedure 16 or otherwise. Specifically, Section 4 of CIPA provides that “upon a sufficient showing,” a court may “authorize the United States to delete specified items of classified information from [discovery].” 18 U.S.C. app. 3 § 4. This provision “clarifies district courts’ powers under Federal Rule of Criminal Procedure 16(d)(1) to issue protective orders denying or restricting discovery for good cause, which includes information vital to the national security.” *United States v. Stewart*, 590 F.3d 93, 130 (2d Cir. 2009) (internal quotation marks omitted); *see also* Fed. R. Crim. P. 16(d)(1) (district courts may “for good cause, deny . . . discovery or inspection, or grant other appropriate relief”).

The Second Circuit has explained that, in analyzing a Section 4 motion, a district court should engage in a three-stage analysis. *See United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008). First, the Court must determine whether the classified information at issue is discoverable. *See id.* Second, the Court should assess whether the Government has properly invoked the need to protect against the disclosure of classified information, which the Second Circuit determined is sourced in the common-law privilege against the disclosure of state secrets. *See id.* The Second Circuit explained that the state secrets “privilege ‘allows the government to withhold information from discovery when disclosure would be inimical to national security.’” *Id.* at 78-79 (quoting *Zuckerbraum v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991)). That privilege, the *Aref*

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court observed, can only be invoked by the “head of the department which has control over the matter, after actual personal consideration by that officer.” *Id.* at 80 (internal citations and quotation marks omitted); *see United States v. Zubaydah*, 595 U.S. 195, 204-05 (2022).

The third stage in the above-described analysis is the Court’s determination of whether, if it has been invoked, the Government’s common-law privilege must give way. *See Aref*, 533 F.3d at 80. This includes consideration of whether the classified material that the Government proposes to delete from discovery is both “relevant and helpful” to the defense, and not cumulative of information already in the possession of the defendant. *See id.*; *United States v. Abu-Jihad*, 630 F.3d 102, 142 (2d Cir. 2010); *United States v. Kwok*, No. 23 Cr. 118 (AT), 2024 WL 1704998, at *2-3 (S.D.N.Y. Apr. 18, 2024). The “relevant and helpful” standard was first articulated by the Supreme Court in *United States v. Roviaro*, 353 U.S. 53 (1957), a case that concerned the privilege that permits the Government, in certain circumstances, to withhold the identity of its informants.

CIPA Section 4 Filings Are Properly Made *Ex Parte* and *In Camera*

CIPA expressly authorizes Section 4 filings to be made *ex parte, in camera*. *See* 18 U.S.C. app. 3 § 4 (“The court may permit the United States to make a [Section 4] request . . . in the form of a written statement to be inspected by the court alone.”). Section 4 additionally provides that, “[i]f the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.” *Id.* Congress viewed the *ex parte* nature of a Section 4 proceeding as important. As the record of the House of Representatives put it, “since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.” H.R. Rep. No. 96-831, pt. 1, at 27 n.22 (1980); *see also* Rule 16 Advisory Committee Notes, 1966 Amendments, Subdivision (e) (“[I]t would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved.”).¹

Proceeding *ex parte* and *in camera* makes sense in light of CIPA’s purpose. First, a Government motion pursuant to Section 4 is made to, among other things, delete certain materials so that the Government will not need to reveal those materials. If the Government’s motion to delete were not reviewed *in camera* and *ex parte*, the motion practice would itself reveal the very information—and, commonly, the sensitive technique or techniques used to obtain that information—that the Government seeks ultimately to shield in the interest of national security. *See, e.g., Aref*, 533 F.3d at 81 (“When the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.” (internal quotation marks omitted)); *United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008) (“The right that section four confers on the government would be illusory if defense counsel were allowed to participate in section four proceedings because defense counsel would be able to see the information that the government asks the district court to keep from defense counsel’s view.”); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir.

¹ Similarly, Rule 16(d)(1) contemplates the same procedure, stating: “At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*.”

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1998) (“The legislative history [of CIPA] explains that because the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.”).

Second, CIPA Section 4 motions concern the question of what the Government will turn over during the discovery process. Such questions are usually answered solely by Government attorneys with no Court involvement. When the Government moves for the Court to become involved in assessing whether certain materials must be produced, it is entirely routine for that judicial assessment to be handled *ex parte, in camera*. As the Court of Appeals for the D.C. Circuit has noted, *ex parte* CIPA practice is “close[ly] analog[ous]” to other *ex parte* practices:

When a court (rather than the prosecutor alone, as is ordinarily the case) reviews evidence *in camera* to determine whether it constitutes a witness statement subject to disclosure under the Jencks Act, 18 U.S.C. § 3500(b), or exculpatory material subject to disclosure under *Brady*, the defendant is likewise not entitled to access to any of the evidence reviewed by the court . . . to assist in his argument that it should be disclosed.

United States v. Mejia, 448 F.3d 436, 458 (D.C. Cir. 2006) (citations and internal quotation marks omitted).

In accordance with the foregoing principles, courts in this Circuit and elsewhere routinely permit the Government to make Section 4 filings *ex parte* and *in camera*, regardless of whether one or more defense counsel has or could obtain an appropriate security clearance. *See, e.g., Abu-Jihad*, 630 F.3d at 143 (rejecting argument that Government’s *ex parte* and *in camera* submissions were improper (citing *Aref*, 533 F.3d at 81)); *United States v. Liu*, No. 19 Cr. 804 (VEC), 2021 WL 3374535, at *4 (S.D.N.Y. Aug. 3, 2021) (noting that *ex parte* consideration was appropriate and that an argument to the contrary “is foreclosed by CIPA itself and has been rejected repeatedly by the Second Circuit and other courts to consider the issue”); *United States v. Saipov*, No. 17 Cr. 722 (VS) (S.D.N.Y. Oct. 29, 2019), ECF No. 212 (“Courts routinely permit the Government to proceed *ex parte* when the substance of the classified information that the Government seeks to [] withhold from discovery is explicitly discussed in the relevant motion.”) (collecting cases); *accord United States v. Alimehmeti*, No. 16 Cr. 398 (PAE) (S.D.N.Y. May 8, 2017), ECF No. 54 (denying defense motion for access to Government’s *ex parte* Section 4 motion); *United States v. Jones*, No. 16 Cr. 19 (PGG) (S.D.N.Y. Aug. 16, 2016), ECF No. 30 (Tr. at 5-7) (same); *United States v. Mostafa*, No. 04 Cr. 356 (KBF) (S.D.N.Y Jan. 17, 2014), ECF No. 233 (same); *United States v. Ahmed*, No. 10 Cr. 131 (PKC), 2011 WL 4915005, at *6 (S.D.N.Y. Sept. 23, 2011) (ruling, over objection of cleared defense counsel, that *ex parte, in camera* consideration of the Government’s Section 4 motion was proper).

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Respectfully submitted,

DAMIAN WILLIAMS
United States Attorney

By: /s/
Rebecca T. Dell
Derek Wikstrom
Assistant United States Attorneys
(212) 637-2198 / 1085

Cc: Defense Counsel (by ECF)